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No. 85-249

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1985

CITY OF LITTLE ROCK,

Petitioner,

vs.

DEBBIE WILLIAMS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a single isolated unconstitutional firing of a court clerk by a municipal judge possessing authority to hire and fire his employees establishes an official policy, custom, or practice of a municipality sufficient to render the municipality liable for damages under 42 U.S.C. § 1983.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Debbie Williams respectfully requests that this Court deny the Petition for Writ of Certiorari seeking to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The District Court did not issue an opinion in this matter. A copy of the judgment is included in the Appendix, page A-1 of the Petition. The panel decision of the United States Court of Appeals is also included in the Appendix, page A-9 of the Petition. *Williams v. Butler,* 746 F.2d 431 (8th Cir. 1984). The Court divided evenly on rehearing *en banc,* so no additional opinion was rendered. A copy of the May 13, 1985, order affirming the District Court is included in the Appendix, page A-36 of the petition. *Williams v. Butler,* 762 F.2d 73 (8th Cir. 1985).

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JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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REASONS FOR DENYING WRIT

Petitioner has failed to support his allegations that the Eighth Circuit Court of Appeals has (a) decided an important question of federal law which should be settled by this Court and (b) has decided a federal question in a way that conflicts with applicable decisions of this Court or the Courts of Appeals. The arguments advanced by petitioner are based on factual disputes, which do not warrant review, rather than legal disputes.

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STATEMENT OF THE CASE

This is an action seeking redress for a city employee who was subject to retaliation for exposing municipal corruption. Prior to May, 1981, respondent Debbie Williams was employed as the Chief Clerk of the Municipal Court-Traffic Division of the City of Little Rock, Arkansas. In the course of her work, respondent observed William Butler, an elected municipal judge, deliberately destroy traffic tickets. Respondent reported the destruction of the tickets to the Police Department, and voluntarily testified before a grand jury about her observations. When Judge Butler subsequently learned that respondent had disclosed the destruction of the tickets, he dismissed her from her position as Chief Clerk.

Respondent brought this Section 1983 action against Judge Butler in his official capacity, alleging that the dismissal violated her First Amendment rights, and seeking actual and punitive damages. Judge Butler, in turn, filed a third-party complaint against the City of Little Rock, alleging that Butler had acted as an agent and on behalf of the city in firing respondent. A jury ruled in favor of respondent on her claim against Butler, awarding her $40,000 in compensatory damages and $60,000 in punitive damages. The district judge ruled in favor of Butler on his cross complaint, holding that Butler had acted as a city policy-making official in dismissing respondent from her job, and that the city was thus liable for any award against Butler. The district court set aside the jury award of punitive damages, holding that that award, since it would have to be paid by the city, was precluded by *Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981).

On appeal the city conceded that the dismissal of respondent was unconstitutional. The City challenged the trial judge's factual finding that Butler was a policy-making official, and that he had acted within the scope of his policy-making authority in dismissing respondent. (Pet. App. 11-23) The court of appeals affirmed both findings. Judge McMillian dissented, arguing that Butler's conduct was, in fact, an "aberrant" action outside the scope of his policy-making authority. (Pet. App. 33) The decision of the panel was reheard *en banc*, and the decision of the district court was affirmed by an equally divided court. (Pet. App. 36-37)

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person with the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

ARGUMENT

1. This case, unlike *City of Oklahoma v. Tuttle*, — U.S. —, 105 S.Ct. 2427 (1985), and *Pembaur v. Cincinnati*, No. 84-1160, concerns the actions of a high-level municipal official whom both courts below found, and whom petitioner now acknowledges, was a policy-making official.

The district court held that Judge Butler exercised plenary policy-making authority over personnel matters.[1] The court of appeals affirmed that factual finding. (Pet. App. 13-14) Petitioners in this court concede that Butler was indeed a policy-making official within the meaning of *Monell v. Department of Social Services*, 438 U.S. 658 (1978).[2] Here, unlike *Tuttle* and *Pembaur*, there is an undisputed finding that the action of that policy-making official, in dismissing respondent, was itself an unconstitutional action, rather than merely a direct or indirect cause of a constitution violation. (Pet. 5; Pet. App. 11)

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[1]Pet. App. 3-4. Tr. 494:

"The Court: . . . I think the City turned . . . over to him, gave him the authority and responsibility for administering personnel decisions in the Little Rock Muncipal Court . . ."

"[Counsel for the City]: You're finding then that he set policy, is that the essence?"

"The Court: I'm finding that they completely turned it over to him, and he operated it exclusively. Yes."

[2]Petition, p. 5:

"Williams has successfully argued that Butler was granted policy-making authority by the City of Little Rock to make personnel decisions."

Petition, p. 10:

"The opinion in *Tuttle* ostensibly dealt only with lower level municipal employees. This case squarely addresses municipal liability for the acts of *policy-makers*." (Emphasis added.)

Petition, p. 10:

"The circuits are in disagreement about the exposure of municipalities to liability for the acts of *policy-makers*." (Emphasis added.)

The petition presents an essentially factual contention, asserting that Butler's conduct was an "aberrant" act, outside of his general policy-making authority. (Pet. 5) Petitioner advanced this factual argument in the district court, insisting that the evidence showed "that defendant Butler acted . . . completely outside of and beyond the scope of his authority."[3] The district judge found, however, that Butler "acted . . . within the authority delegated to him by the City" when he dismissed respondent. (Pet. App. 3) A majority of the court of appeals sustained that finding, holding Butler "was given . . . authority . . . to make the decision" at issue. (Pet. App. 20) Judge McMillian dissented, insisting that Butler's conduct was, in fact, an "aberrant action." (Pet. App. 33) The trial court's finding with regard to the scope of Butler's authority may be overturned only if clearly erroneous. *Anderson v. City of Bessemer City*, — U.S. —, 105 S.Ct. 2d 1504 (1985). A factual finding concurred in by both a trial court and court of appeals is not ordinarily reconsidered by this court.

2. This case involves no conflict among the circuits. Every court of appeals which has considered this issue has held that a municipality may be held liable under *Monell* for actions taken by officials exercising delegated

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[3]Post Trial Brief, p. 3. That argument was also advanced in opposition to Butler's proposed third party complaint, which asserted "the defendant acted out of personal spite, certainly not in accordance with any authority reposed in him by the City of Little Rock." Brief in Support of Third Party Defendant's Motion to Dismiss Third Party Complaint, paragraph 3.

policy-making authority. The Third,[4] Fourth,[5] and Fifth circuit decisions relied on by petitioner all expressly hold that municipal liability may be based on the exercise of *v. City of Slidell*, 728 F.2d 762 (5th Cir. 1984) (*en banc*), for example, the Fifth Circuit reiterated its previous holdings that a "policy is that of the city . . . where it is made by an official under authority to do so given by the governing authority." 728 F.2d at 769. The Fifth Circuit in *Bennett* expressly reaffirmed its previous decision that actions by independent elected officials, such as Judge Butler in the instant case, are inherently delegated policy-making actions for which a city would be liable. 735 F.2d 861, 862 (5th Cir. 1984), (*en banc*), *cert. denied*, — U.S. —, 105 S.Ct. 3476 (1985), citing *Familias Unidas v. Briscoe*, 619 F.2d 391 (5th Cir. 1980).

The application of these principles to the disputed facts in any particular case may, of course, occasion disagreements. In *Bennett*, for example, the *en banc* court agreed unanimously on the applicable legal standard, 735 F.2d at 862, but was sharply divided regarding whether those standards warranted affirmance or reversal of the trial court finding of liability. *Id.* This court denied certiorari in *Bennett*, recognizing that such a fact-bound dispute did not raise any legal issue warranting review. — U.S. —, 105 S.Ct. 3476 (1984).

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[4]*Losch v. Borough of Parkesburg*, 736 F.2d 903, 911 (3rd Cir. 1984), indicated that it was important whether the official whose actions were challenged was such a "final authority." *Losch* relied in turn on an earlier Third Circuit decision, *Black v. Stephens*, 662 F.2d 181 (3rd Cir. 1981), which based a finding of municipal liability on the fact that the responsible official was "the final authority in charge of the police department." 662 F.2d at 191.

[5]*Wellington v. Daniels*, 717 F.2d 932, 936 (4th Cir. 1983) ("when an official has final authority in a matter involving the selection of goals, his choices represent policy").

The decision of the Eighth Circuit in the instant case did not, as petitioner implies, adopt any *per se* rule that all actions of policy-making officials give rise to liability under *Monell,* regardless of whether those actions are within the scope of the delegated policy-making authority. On the contrary, the panel below expressly refused to "speculate beyond the precise factual situation in this case" (Pet. App. 20), and carefully distinguished a case such as *Bennett* involving "an apparent aberrant act." (*Id.* at 17) The court below acknowledged that the exact limits of an official's policy-making authority would be "difficult . . . to articulate" (*Id.* at 21 n.10), and that not every discretionary act by a public official was *ipso facto* a policy decision. (*Id.*) The majority indicated it had "no quarrel" with the legal standard proposed by Judge McMillian's dissent, and disagreed only about the sufficiency of the evidence to satisfy that standard. (*Id.*) Such essentially factual disputes do not warrant review by this court.

3. Petitioner renews the "unlikely or extravagant" argument rejected in *Tuttle* that *Monell* does not impose liability for injuries occasioned by a single application of proven city policy. — U.S. —, 105 S.Ct. at 2441. (Brennan, Jr., concurring) The plurality opinion in *Tuttle* emphasized that "it requires only one application of a policy . . . to satisfy fully *Monell's* requirement that a municipal corporation be held liable only for constitutional violations resulting from the municipality's official policy." — U.S. —, 105 S.Ct. at 2436. The concurring opinion joined by three members of the court in *Tuttle* reached the same conclusion:

> A rule that the city should be entitled to its first constitutional violation without incurring liability . . . would be a legal anomoly, unsupported by the legislative history or policies underlying § 1983. A § 1983 cause of action is as available for the first victim of a policy or custom . . . as it is for the second and subsequent victims.

— U.S. —, 105 S.Ct. at 2440, 2441.

There may, of course, be cases in which a genuine dispute exists either with regard to whether an official had policy-making authority, or as to the actual actions or motives of that official. In such a situation a pattern of activity might be of evidentiary importance. In the instant case, however, both lower courts found, and petitioner acknowledges, that Butler was, in fact, a policy-making official, and that his actions were unconstitutional.

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CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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